The right to liberty in European Union law and mutual recognition in criminal matters

The Right to Liberty in European Union Law and Mutual Recognition in Criminal Matters

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Abstract

This article analyses the interaction between the application of mutual recognition in criminal matters and the right to liberty. The main argument is that the current content of the right to liberty in EU law is unsuitable for mutual recognition procedures. As for the structure of this article, firstly, the main features of mutual recognition as a method of inter-state cooperation in criminal matters are outlined. Secondly, the approach of the Union (especially the Court of Justice) to the right to liberty is clarified. Thirdly, four mutual recognition instruments are analysed in light of the right to liberty: namely, the Framework Decisions on the European Arrest Warrant, the Transfer of Prisoners, the Probation Measures and the European Supervision Order. The assessment confirms that the higher level of automaticity in judicial cooperation introduced by mutual recognition requires a rethink of the existing understanding of the right to liberty in EU law.

Keywords

Right to liberty, mutual recognition, criminal law, transfer of persons

I. Introduction

Mutual recognition has constituted a great challenge to fundamental rights protection in European Union (EU) law. "Borrowed" from the law of the internal market, this principle implies that a judicial order issued in one Member State is recognised and executed in another Member State without further formality. By doing so, it is meant to substitute the previous system of extradition in inter-state cooperation in criminal matters. The implications in terms of fundamental rights – and the right to liberty in particular - are manifold. Firstly, the higher level of automaticity brought about by mutual recognition rests on a legal fiction. This fiction is the principle of mutual trust, i.e. the presumption that Member States respect fundamental rights throughout the Union. Not surprisingly, such a presumption has been highly contested over the last years, not the least because of important judgments showing how critical this fiction can be.[1]

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[1] See *M.S.S. v. Belgium and Greece*, (Application no. 30696/09) (2011) 53 E.H.R.R. 2; *N.S. v Secretary of State for the Home Department*, C-411/10, and *M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, C-493/10, EU:C:2011:865. See E Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' (2013) 9 (1) *Utrecht Law Review* 135; V Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31 (1) *Yearbook of European Law* 319.

Secondly, mutual recognition is mainly meant to enforce judicial decisions against individuals, with strong emphasis being placed on state demands. This has led to paying higher attention to *effectiveness* of judicial cooperation at the expenses of individual rights protection.[2] We have seen this especially in the case-law of the Court of Justice of the EU (CJEU or the Luxembourg Court) on the European Arrest Warrant Framework Decision (EAW FD).[3] Thirdly, there are a number of mutual recognition instruments in EU law involving deprivation of liberty. Automaticity and effectiveness place the right to liberty under pressure, so that its content and protection in the Union have to be carefully assessed. In this article I analyse the relationship between the right to liberty in EU law and the FDs on: the EAW,[4] the transfer of prisoners (2008/909/JHA),[5] probation measures (2008/947/JHA),[6] pre-trial measures alternative to detention (2009/829/JHA, or ESO FD).[7] The main hypothesis is that the application of mutual recognition to criminal law results in the need to redefine the current content of the right to liberty at EU law level. In order to verify the hypothesis, I structure the article into three parts. In the first part (II), I set the ground, by outlining the principles of mutual recognition and mutual trust, on the one hand, and the right to liberty in EU law, on the other. With regard to the right to liberty, I distinguish between a "default right to liberty" and an "evolutionary right to liberty". In this first part I address the "default right to liberty", as shaped by: The Charter of the Fundamental Rights EU (CFREU or the Charter) and its Explanations;[8] the European Convention on Human Rights (ECHR) as interpreted by the European Courts of Human Rights (ECtHR or the Strasbourg Court). As clarified by the Explanations, the CFREU and ECHR relevant provisions on the right to liberty have the same meaning and scope. The "evolutionary right to liberty" is the product of the interaction between the "default right to liberty" and its interpretation of the CJEU in the context of mutual recognition. As the evolutionary right to liberty logically presupposes the default right to liberty, I deal with the latter in the first part, and focus on the former in the second part of this article. In any case, the right of liberty in EU law and the ECHR firstly – and most importantly – requires that deprivation of liberty be carried out in the *cases* and *according to the procedures* established by the law.

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[2] V Mitsilegas, 'Mutual Recognition, Mutual Trust and Fundamental Rights After Lisbon' in V Mitsilegas et al. (eds), *Research Handbook on EU Criminal Law* (Edward Elgar, 2016), pp. 148-177; V Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' (2015) 7 (4) *New Journal of European Criminal Law* 457.

[3] *Minister for Justice and Equality v Francis Lanigan*, C-237/15 PPU, EU:C:2015:474, para 28; *Melvin West*, C-192/12 PPU, EU:C:2012:404, para 54; *Stefano Melloni v Ministerio Fiscal*, C-399/11, EU:C:2013:107, para 36; *Jeremy F. v Premier ministre*, C-168/13 PPU, EU:C:2013:358, para 34.

[4] Council Framework Decision (JHA) No 584/2002 [2002] OJ L 190/1.

[5] Council Framework Decision (JHA) No 909/2008 [2008] OJ L 327/27.

[6] Council Framework Decision (JHA) No 947/2008 [2008] OJ L 337/102.

[7] Council Framework Decision (JHA) No 829/2009 [2009] OJ L 294/20.

[8] Charter of the Fundamental Rights of the European Union; Explanations related to the Charter of Fundamental Rights.

In the second part (III), I shall analyse the four FDs that are relevant to the right to liberty, as well as the interpretation given by the CJEU. I highlight the criticality both in the legislation and in the case-law, and show the unbalanced relationship between the smoothness of judicial cooperation, on the one hand, and the level of protection of the right to liberty, on the other. I focus in particular on two flaws of the current content of the right to liberty in EU law. Firstly, the FDs lay down a legal framework that lacks legal certainty. If deprivation of liberty shall be carried out in the *cases* and according to the *procedures* established by the law, the rules *authorising* (the *cases*) and *governing* (the *procedures*) deprivation of liberty must be clear, accessible and foreseeable. Secondly, the right to liberty in EU law seems not to take into account detention conditions and penitentiary regimes. However, I submit that the concept of *established procedures* required by the right to liberty should also include these aspects. Indeed, requiring that 'one shall be deprived of liberty in accordance with a procedure established by law' logically involves the phase of enforcement: so long as deprivation of liberty is ongoing, clear and accessible legal procedures must apply.

In conclusion (IV), I argue that the application of mutual recognition to criminal matters requires the definition of a new EU test for the right to liberty, capable of balancing the shortcomings described.

II. Mutual Recognition in Criminal Matters and the Right to Liberty in EU Law

A. Mutual Recognition and Mutual Trust in EU Law

As known, mutual recognition in criminal matters is a principle borrowed from the law of the internal market, where it was introduced by the *Cassis de Dijon* judgment of the CJEU.[9] It requires that a product lawfully produced and marketed in one Member State, should be capable of being marketed into another Member State, unless grounds for refusal apply.[10] The 1999 Tampere Council adopted the principle of mutual recognition as the cornerstone of judicial cooperation in criminal matters. In criminal law, mutual recognition is used to step up judicial cooperation between Member States within the EU: according to this principle, a judicial order issued by one Member State is to be recognised and executed by another Member State, save where grounds for refusal apply. However, the principle of mutual recognition had already been applied to judicial

[9] *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, C-120/78, EU:C:1979:42; K Armstrong 'Mutual Recognition' in C Barnard and J Scott (eds), *The Law of the Single European Market. Unpacking the Premises*, (Hart Publishing, 2002), pp. 225-268; J Snell 'The Internal Market and the Philosophies of Market Integration' in C Barnard and S Peers (eds), *European Union Law* (Oxford University Press, 2004), pp. 300-323.

[10] A Rosas 'Life after Dassonville and Cassis: Evolution but No Revolution' in M Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010), pp. 433-446; C Barnard, *The Substantive Law of the EU: The Four Freedoms*, 4th edition (Oxford University Press, 2013), pp. 171–177; C Janssen, *The Principle of Mutual Recognition in EU Law*, (Oxford University Press, 2013), pp. 31 onwards.

cooperation in civil justice, where a number of international law instruments had been adopted over the previous decades.[11] Examples in this respect are the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, and the 1988 Lugano Convention, which extended the application of the Brussels Convention to certain States members of the European Free Trade Association.[12]

The principle of mutual recognition streamlines the previous system of extradition, by introducing a higher level of automaticity in inter-state cooperation in criminal matters.[13] It does so by means of three main novelties: firstly, it abolishes the principle of dual criminality (although not in all cases); secondly, it allocates the responsibility for the surrender on judicial rather than political authorities; thirdly, it (almost completely) drops the prohibition for a state to extradite its own nationals (also referred to as 'nationality exception' or 'nationality ban').[14] The cooperation on a given order (arrest warrant, probation measure, custodial sentence and the like) is regulated by specific legislative instruments adopted at EU law level. In the cases analysed in this article, the recognition of the judicial decision results in the coercive transfer of the person concerned from the issuing Member State to the executing Member State. The application of mutual recognition to criminal law has drawn criticism over the years, with major concerns being voiced towards the inadequate level of individual safeguards.[15]

Indeed, mutual recognition in criminal matters (and not only) implies the extraterritoriality of Member States' rules and standards, as well as a higher level of automaticity in judicial cooperation.[16] This may happen only in the context of a general feeling of mutual trust among Member States.[17] Broadly speaking, mutual trust refers to a sociological perspective, which sees trust as a tool to deal with social complexity, when there are certain values shared within a

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[11] Council Draft Programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters [2001] OJ C 12/1, pp. 2 onwards.

[12] Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ L 299/32.

[13] For a diachronic analysis, see S Miettinen, 'Onward Transfer under the European Arrest Warrant: Is the EU Moving Towards the Free Movement of Prisoners?' (2013) 5 (1) *New Journal of European Criminal Law* 99.

[14] M Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?' (2009) 15 (1) *European Law Journal* 79; M Platcha, 'Non-Extradition of Nationals: A Never-Ending Story?' (1999) 13 (1) *Emory International Law Review* 77; Z Deen-Racsmány and R Blekxtoon, 'The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-) Surrender of Nationals and Dual Criminality under the European Arrest Warrant' (2005) 13 (3) *European Journal of Crime, Criminal Law and Criminal Justice* 317.

[15] G. Vernimmen-Van Tiggelen et al (eds), *The Future of Mutual Recognition in Criminal Matters in the European Union* (Editions de l'Université de Bruxelles, 2009); V Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 (5) *Common Market Law Review* 1277; S Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong?' (2004) 41 (1) *Common Market Law Review* 5; S Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' (2007) 14 (5) *Journal of European Public Policy* 762.

[16] On mutual recognition and extraterritoriality, see K Nicolaidis and G Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' (2005) 68 (3) *Law and Contemporary Problems* 263.

[17] *W. J. G. Bauhuis v The Netherlands State*, C-46/76, EU:C:1977:6; *Criminal proceedings against Esther Renée Bouchara, née Wurmser, and Norlaine SA*, C-25/88, EU:C:1989:187; *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)*, C-5/94, EU:C:1996:205.

community, so as to create expectation of regular and honest behaviour.[18] In EU criminal law, mutual trust rests on the presumption that Member States act in compliance with fundamental rights.[19] To this end, Article 6 Treaty on European Union (TEU) stipulates that the Charter has the same value as the Treaty, on the one hand; on the other, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union law.[20]

In the context of this threefold system of fundamental rights protection (CFREU, ECHR, national traditions), the importance of mutual recognition materialises at three levels: a vertical perspective, which raises the issue as to which kind of fundamental rights standard should be applied (that of the Union or that of the Member State); a horizontal dimension, posing the question as to whether a presumption of compliance with fundamental rights by the Member State may be maintained; the EU level, where a Union norm is reviewed against the yardstick of fundamental rights. In the vertical dimension, the most problematic issue has regarded so far the definition of the scope of application of the Charter: whether it binds Member States when they *implement* EU law (as stated in Article 51(1) CFREU), or when they act *in the scope of* Union law (according to the wording of the Explanations).[21] A heated debate flourished, fuelled by highly contested judgments of the Court of Justice.[22] The horizontal dimension takes the shape of the duty, for the executing Member State, to recognise the standard of fundamental rights protection of the issuing Member State as equivalent to its own standard.[23] However, the CJEU has found that this presumption is a refutable one, and that a conclusive presumption would be incompatible with EU law.[24] As shown below, the

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[18] N Luhmann, *La Fiducia* (il Mulino, 2002); F Fukuyama, *Trust: The Social Virtues and The Creation of Prosperity* (Penguin, 1995); G Majone (ed), *Regulating Europe* (Routledge, 1996).

[19] D Flore, 'La Notion de Confiance Mutuelle: L' "alpha" Ou L' "oméga" D'une Justice Pénale Européenne?' in G De Kerchove and A Weyembergh (eds), *La Confiance Mutuelle Dans L'espace Pénal Européen - Mutual Trust in the European Criminal Area* (Editions de l'Université de Bruxelles, 2005), pp. 17–28; V. Mitsilegas, see note 1 above.

[20] S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 (4) *Human Rights Law Review* 645; F Fabbrini, *Fundamental Rights in Europe* (Oxford University Press, 2014).

[21] See, among many, A Knook, 'The Court, the Charter and the Vertical Division of Powers in the European Union' (2005) 42 (2) *Common Market Law Review* 367; K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 (03) *European Constitutional Law Review* 375; J H H Weiler, 'The Transformation of Europe' (1991) 100 (8) Yale Law Journal 2403; P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 (5) *Common Market Law Review* 945.

[22] *Melloni v Ministerio Fiscal*, EU:C:2013:107; *Åklagaren v Hans Åkerberg Fransson*, C-617/10, EU:C:2013:105; *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo*, C-206/13, EU:C:2014:126. F Fontanelli, 'Implementation of EU Law through Domestic Measures after Fransson: the Court of Justice Buys Time and "Non-preclusion" Troubles Loom Large' (2014) 39 (5) *European Law Review* 782; L Besselink, 'The Parameters of Constitutional Conflict after Melloni' (2014) 39 (4) *European Law Review* 531; A Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10 (2) *European Constitutional Law Review* 308; G Cavallone, 'European Arrest Warrant and Fundamental Rights in Decisions Rendered in Absentia: The Extent of Union Law in the Case C-399/11 Melloni v Ministerio Fiscal' (2014) 4 (1) *European Criminal Law Review* 19; N de Boer, 'Addressing Rights Divergences under the Charter: Melloni' (2013) 50 (4) *Common Market Law Review* 1083.

[23] See in particular *Criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, C-187/01 and C-385/01, EU:C:2003:87, para 33.

[24] See *N. S. and M. E.*, EU:C:2011:865, para 190.

Court has recently confirmed this approach in the *Caldararu* judgment.[25] In this case, the Luxembourg judge acknowledged the possibility to postpone and non-implement the EAW FD, where there is a serious risk that the person concerned will be subject to inhumane treatment in the issuing Member State. The third scenario concerns the possible review of EU law against the benchmark of fundamental rights. Here, the compliance of EU norms with fundamental rights is at stake. For the purposes of this paper, the *Advocaten voor de Wereld* case is worth referring to.[26] The Court upheld the compatibility of the EAW FD with Article 6(2) TEU, and in particular with the principle of legality. The CJEU argued that the aim of the FD is to provide Member States with a *procedural* instrument, and not to harmonize national regimes of substantive criminal law. Indeed, it is still for Member States to define criminal offences and related penalties.[27]

Having set the broader ground on the legal framework concerning fundamental rights protection (with specific regard to mutual recognition in criminal matters), now I present the content of the benchmark adopted, namely the right to liberty in EU law.

B. The Right to Liberty in Europe

Article 6 CFREU is devoted to the right to liberty, according to which 'Everyone has the right to liberty and security of the person'. According to the Praesidium's Explanations to the Charter, Articles 6 CFREU and 5 ECHR have the same meaning and scope.[28] Article 5 ECHR states that 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'. Among the justified cases of deprivation of liberty, Article 5(1)(f) features 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. This is the ground regarding inter-state cooperation in criminal matters. As I show below, Article 5(1)(f) – and its interpretation provided by the Strasbourg Court - are the fundamental right references used by the CJEU to assess the right to liberty in the context of mutual recognition procedures. The ECtHR has interpreted

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[25] *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, C-404/15 and C-659/15 PPU, ECLI:EU:C:2016:198.

[26] G De Burca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 (2) *Maastricht Journal of European and Comparative Law* 13; F Fontanelli, 'National Measures and the Application of the EU Charter of Fundamental Rights – Does Curia.eu Know Iura.eu?' (2014) 14 (2) *Human Rights Law Review* 231; F Fontanelli, 'The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights' (2014) 20 (2) *Columbia Journal of European Law* 194.

[27] *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, C-303/05, EU:C:2007:261, paras 53 and 59. F Geyer, 'European Arrest Warrant: Advocaten Voor de Wereld VZW v. Leden van de Ministerraad' (2008) 4 (1) *European Constitutional Law Review* 149; D Leczykiewicz, 'Constitutional Conflicts and the Third Pillar' (2008) 33 (2) *European Law Review* 230; E Cloots, 'Germs of Pluralist Judicial Adjudication: Advocaten Voor de Wereld and Other References from the Belgian Constitutional Court' (2010) 47 (3) *Common Market Law Review* 645; D Sarmiento, 'European Union: The European Arrest Warrant and the Quest for Constitutional Coherence' (2008) 6 (1) *International Journal of Constitutional Law* 171.

[28] CFREU, Article 52(7).

Article 5(1)(f) in the sense that deprivation of liberty is lawful (not arbitrary) where it is: carried out in good faith; closely connected to the ground of detention relied on by the executing judicial authority; enforced in appropriate place and conditions; reasonably lengthy in relation to the purposes pursued. The Strasbourg Court does not require that decision on deprivation of liberty in this context be necessary and proportionate, but only that extradition procedures be ongoing and carried out with due diligence.[29]

In the context of mutual recognition, the issuing and executing judges have been seen as exempt from the duty of carrying out the proportionality test, when issuing or executing a judicial order. This has drawn the attention of the scholarship, EU institutions and practitioners.[30] With specific regard to the position of the issuing judge in relation to the EAW, the Council found that, although the proportionality check does not constitute a legal obligation on the issuing Member State, the competent authorities have to evaluate the proportionality between the aim of the surrender and the fundamental rights implications. It has been argued that imposing an obligation of this kind on the issuing judge would be difficult, since a major difference exists between two groups of Member States: on the one hand, there are those Member States which feature the principle of legality in their systems of criminal justice (the obligation to investigate and prosecute all criminal offences);[31] on the other hand, a minor number of states applies the opportunity principle, according to which the national judiciary retains a certain margin of discretion in this regard.[32] Therefore, requiring a proportionality test to the former group of states would significantly affect their legal systems. Besides, the case may be that Member States applying the legality principle suffer from over-criminalisation and extensive use of harsh custodial penalties, which in turn are capable of triggering the issuing of a EAW. The combination of these three elements (mandatory prosecution, diffuse criminalisation and frequent recourse to high levels of imprisonment) makes the introduction of a binding proportionality test rather difficult. Some authors have also argued that 'in

[29] R White and C Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights*, 5th Edition (Oxford University Press, 2010), pp. 122 onwards; C Grabenwarter, *The European Convention for the Protection of Human Rights and Fundamental Freedoms: A Commentary*, 1st Edition (Beck/Hart Publishing, 2014), pp. 60 onwards; A Mowbray, *Cases and Materials on The European Convention on Human Rights*, 2nd edition (Oxford University Press, 2007), pp. 245 onwards.

[30] J Vogel and J R Spencer, 'Proportionality and the European Arrest Warrant' (2010) 56 (6) *Criminal Law Review* 474; E Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart Publishing, 2012); N Keijzer and E van Sliedregt (eds), *The European Arrest Warrant in Practice* (T. M. C. Asser Press, 2005); E Xanthopoulou, 'The Quest for Proportionality for the European Arrest Warrant' (2015) 5 (1) *New Journal of European Criminal Law* 32; D Helenius, 'Mutual Recognition in Criminal Matters and the Principle of Proportionality. Effective Proportionality or Proportionate Effectiveness?' (2014) 5 (3) *New Journal of European Criminal Law* 349. Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, 11.4.2011 COM (2011) 175 final; Council doc 17195/1/10 REV1, 17 December 2010; Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, 11.4.2011 COM(2011) 175 final.

[31] For instance, Germany, Italy, Sweden, Croatia, Poland.

[32] E.g. Belgium, France, The Netherlands and The United Kingdom.

certain cases, the problem of disproportionate EAWs is self-regulatory'.[33] The Council's Handbook and the 2011 Commission Evaluation Report urged Member State to deal with the issue of disproportionate EAWs. Following these recommendations, Poland has adopted legislative reforms to make the national regime in compliance with the principle of proportionality. Growing attention to proportionality concerns in mutual recognition is confirmed by Directive 2014/41/EU, which makes the issuance of a European Investigation Order subject to an assessment in terms of necessity and proportionality.[34] It should also be noted that the UK amended the Extradition Act 2003 (which implements the EAW FD) in 2014, by inserting section 21A, entitled 'Person not convicted: human rights and proportionality'. According to this amendment, the judge called on to execute a EAW is to determine whether the surrender (the text uses the word 'extradition) would be disproportionate, by taking into account the seriousness of the offence, the likely penalty that would be imposed, the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition. The judge must order discharge, should s/he make the decision that the surrender would be disproportionate.

Another important feature of the right to liberty regards legal certainty. Such a right stipulates that deprivation of liberty is to be carried out *in the cases* and *according to the procedures* established by the law. This requires that the legal basis *authorising* and *regulating* deprivation of liberty be of sufficient quality: clear and accessible legislative provisions are to be laid down. Broadly-worded rules allowing for detention, or vague norms establishing procedures for deprivation of liberty may thus result in a violation of the right.[35] As I show below, the FDs involving deprivation of liberty leave much to be desired in terms of legal certainty, so resulting in serious concerns over the protection of the right to liberty in EU law.

Thirdly, mutual recognition brings to the fore the issue of the actual scope of the right to liberty. The higher level of automaticity introduced by mutual recognition calls for an enhanced level of protection of individual rights. In particular, the question arises as to what situations should be included in the scope of the requirement that deprivation of liberty be carried out in the *cases* and according to the *procedures* established by the law. The *cases* are those situations that can lawfully result in deprivation of liberty. As shown below, mutual recognition of *pre* and *post*-trial measures alternative to detention result in the transfer of the person from one state to another. However, the national regimes on these measures vary considerably throughout the EU. This has to do, mostly, with the consequences ensuing from the breach of these *pre* or *post* trial measures: one state may

[33] A Weyembergh, I Armada, C Brière, 'European Added Value Assessment The EU Arrest Warrant. Critical Assessment of the Existing European Arrest Warrant Framework Decision', Brussel, 2014, p. 35.

[34] Council Directive (EU) No 2014/41 [2014] OJ L 130/1.

[35] *Amuur v France* (Application no. 19776/92) (1996) 22 EHRR 533, paras 50-54.

feature detention, while other states can resort to less harsh sanctions. The inclusion of these situations in the concept of *cases* can significantly improve the content of the right to liberty in EU law. The same may hold true for the meaning of *procedures*. The doubt here involves the possible inclusion, in this requirement, of the procedures whereby deprivation of liberty is carried out *after* the apprehension of the person concerned: namely, the phase of enforcement. The first requirement of the right to liberty is that 'everyone shall be deprived of liberty according to the procedures established by the law'. Once the individual has been placed in detention, s/he is still being deprived of liberty, and this requires that clear and accessible legal procedures be applied to this continuing deprivation.[36] This means that penitentiary rules, and more in general detention conditions, can be really relevant to the right of liberty. This is testified by the case-law of the ECtHR, which sees detention conditions as a possible signifier of arbitrary detention, so resulting in a violation of the right to liberty.

So far, I set the stage for the analysis of the mutual recognition instruments involving deprivation of liberty. Firstly, I argued that mutual recognition and mutual trust significantly streamlined inter-state cooperation in criminal matters within the EU, so requiring major attention to the safeguards to protect the person concerned against arbitrary deprivation of liberty. Secondly, I outlined the current content of the right to liberty in EU law, and introduced three main challenges that automaticity poses to this right: proportionality, legal certainty and scope of application. Now I shall discuss the FDs on: the EAW (and the CJEU's interpretation thereof), transfer of prisoners, probation measures and the ESO.

III. Mutual Recognition and the Right to Liberty in Secondary EU Law

A. The EAW FD

The EAW is the first and most prominent instrument of mutual recognition in EU criminal law,[37] aiming to replace extradition procedures with a smoother and swifter system of surrender between judicial authorities. The introduction of the EAW FD has been groundbreaking for a number of reasons: amongst others, the abolishment of the principle of dual criminality, the allocation of the responsibility for the surrender on judicial rather than political authorities, the (almost complete) drop of the prohibition for a state to extradite its own nationals.

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[36] A di Martino, 'La Disciplina Dei CIE è Incostituzionale' *Diritto Penale Contemporaneo*, 11 May 2012.

[37] However, other instances of this kind can also be find outside the judicial cooperation within the EU. See in this respect the Nordic Arrest Warrant. G Mathisen, 'Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond' (2010) 79 (1) *Nordic Journal of International Law* 1.

Though the EAW was preceded by previous attempts to streamline inter-state judicial cooperation in criminal matters,[38] the terroristic attack to the World Trade Centre on 11 September 2001 urged the Union to put into effect actual *EU* instruments to fight crime. This is confirmed by the circumstance that, before 9/11, the EAW was not the highest priority in the EU agenda on mutual recognition in criminal matters.[39] The Commission, in its EAW FD Proposal, explicitly established a link by the FD and EU citizenship, with the latter status eroding the importance of nationality links even with regard to the surrender for detention purposes.[40] The implementation of the EAW FD at the national level has known a difficult path,[41] and Constitutional Courts across the EU had to rule on the compatibility of the EAW FD with their constitutional systems.[42]

According to the wording of the FD, the EAW is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. While Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition, the FD has not the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.[43]

The final decision on the execution should be taken within 60 days after the arrest, which term can be postponed by further 30 days. The surrender must be carried no later than 10 days after the final decision.[44] The executing judge must decide whether the person arrested must be kept in detention pending the decision on the recognition. Release may be ordered, provided that measures are taken so as to ensure that the person will not abscond.[45] The issuing state must deduct the period of detention already served by the person from the total period of detention to be served therein.[46]

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[38] Article 66 of the 1990 Convention implementing the Schengen Agreement refers to the possibility for Member States to extradite their nationals without extradition formalities (as long as the surrendered has agreed before a court and s/he has been informed on his/her right to the extradition procedure). Also the 1996 EU Convention on Extradition between Member States was aimed at limiting the possibility of application of the nationality ban.

[39] Concerning the factors leading to the prioritisation of the EAW, scholars also mention the adoption of the Rome Statute of the International Criminal Court (ICC), which distinguishes the state-to-state extradition from the surrender to the ICC, with the latter excluding the possibility of a nationality exception.

[40] However, this view has been strongly criticized. See in this respect F Impalà, 'The European Arrest Warrant in the Italian Legal System. Between Mutual Recognition and Mutual Fear within the European Area of Freedom, Security and Justice' (2005) 1 (2) *Utrecht Law Review* 56.

[41] For a comparison between the English and France system, see J R Spencer, 'Implementing the European Arrest Warrant: A Tale of How Not to Do It' (2009) 30 (3) *Statute Law Review* 184. For a specific analysis of the Italian case, see L Marin, 'The European Arrest Warrant in the Italian Republic' (2008) 4 (2) *European Constitutional Law Review* 251.

[42] J Komárek , 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of Contrapunctual Principles' (2007) 44 (1) *Common Market Law Review* 9; Z Deen-Racsmány, 'The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges' (2006) 14 (3) *European Journal of Crime, Criminal Law and Criminal Justice* 271.

[43] See note 4 above, Article 1(3) and (2).

[44] Ibid, Articles 17, 23 and 24.

[45] Ibid, Article 12.

[46] Ibid, Article 26.

With regard to the rights of the individual in the context of the procedures of recognition and execution, the FD provides the following. The person concerned has the right to be heard by the executing judge in accordance with the law of the executing Member State. In case of a EAW issued for prosecution, the executing judge must either agree that the requested person should be heard, or temporary transfer him/her to the issuing state. In the first case, the requested person must be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court. The requested person shall be heard in accordance with the law of the executing Member State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities.[47] In the latter situation, conditions and duration of the transfer are determined by the states involved, and the person must be able to return to the executing Member State to attend hearings concerning him or her as part of the surrender procedure.

The FD provides that the recognition and execution of the EAW can be refused on the basis of mandatory and optional grounds for refusal of execution. Within the first category are included grounds such as the *ne bis in idem*, or the fact that the offence on which the EAW is based is covered by amnesty in the executing Member State.[48] Article 4 establishes optional grounds for refusal, among which there is the possibility not to execute the EAW where 'the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law'.[49]

Having presented the main features of the EAW FD, now I move on to the interpretation given by the Court in three preliminary rulings relevant to the right to liberty. In *Radu*, the Court dealt with the possibility to refuse the execution of a EAW on the basis of fundamental rights violation (in particular, the breach of the right to liberty). In such a judgment, the CJEU denied that the EAW FD allows for such a possibility. The *Lanigan* case shows a different approach on the part of the Court, with higher attention being paid to individual rights. The CJEU clarified that the EAW FD must be interpreted in light of Articles 6 and 52 CFREU. The former provision lays down the right to liberty in EU law, whereas the latter stipulates that limitations of the Charter rights are subject to the principle of proportionality. The recent ruling issued by the Court in the *Caldararu* case revolved

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[47] Ibid, Article 18.

[48] Ibid, Article 3.

[49] This provision has given rise to a number of highly discussed preliminary rulings, on the part of the CJEU. See *Proceedings concerning the execution of a European arrest warrant issued against Szymon Kozłowski*, C-66/08, EU:C:2008:437; *Dominic Wolzenburg*, C-123/08, EU:C:2009:616; *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge*, C-42/11, EU:C:2012:517. For comments, see E Herlin-Karnell, 'European Arrest Warrant Cases and the Principles of Non-Discrimination and EU Citizenship' (2010) 73 (5) *The Modern Law Review* 824; V Mitsilegas, see note 1 above, pp. 338 onwards; T P Marguery, 'EU Citizenship and European Arrest Warrant: The Same Rights for All?' (2011) 27 (73) *Merkourios* 84; C Janssen, see note 10 above, pp. 207 onwards.

around the thorny issue of detention conditions and mutual recognition. By this decision, the Luxembourg Court has opened the door to the non-execution of a EAW, should detention conditions in the issuing state prove to be capable of resulting in inhumane or degrading treatment.
In the following section, I present these three judgments. Thereafter, I draw some preliminary conclusions on the EU approach to the relationship between the right to liberty, on the one hand, and the EAW and mutual recognition, on the other.

B. Execution of EAW and Fundamental Rights

The case-law of the CJEU on the EAW FD is conspicuous, and contributed to defining essential aspects of the functioning of this instruments. These decisions cover a broad spectrum of highly sensitive issues, such as the specialty rule, the principle of ne bis in idem, the right to appeal and fair trial.[50] In three judgments, the Court has been faced with questions bearing a direct relevance to the right to liberty: refusal of execution of a EAW on the basis of breach of the right to liberty (*Radu*), the relevance of the right to liberty and proportionality to the interpretation of the EAW FD (*Lanigan*), the role of detention conditions in the EAW system (*Caldararu*).
Radu regarded the issuance of EAWs against a Romanian national who claimed that his defence rights had been violated.[51] The Court was asked as to whether the EAW must satisfy the requirements of necessity and proportionality, and its execution can be refused in case of (actual or potential) violations of Articles 5 and 6 ECHR or Articles 6, 48 and 52 CFREU. The AG recalled the arbitrariness test elaborated by the ECtHR (good faith; connection to detention relied on by the judicial authority; appropriate detention conditions; reasonably length). Furthermore, the AG suggested that the execution of a EAW may be refused on fundamental rights ground (in particular Articles 5 and 6 ECHR and/or Articles 6, 47 and 48 CFREU), but this could occur where 'the deficiency or deficiencies in the trial process [are] such as fundamentally to destroy its fairness'[52]. Breaches that are remediable would not justify a refusal to transferring the requested person to the Member State where those rights are at risk. The Court, unlike the AG, paid very little attention to the right to liberty. Though acknowledging that the right to be heard is enshrined in Articles 47 and 48 CFREU, it posed much more an emphasis on the 'enforcement' objectives of the EAW FD, and rejected the possibility, for the executing judge, to refuse the execution of a EAW on fundamental

[50] See, amongst others, *Gaetano Mantello*, C-261/09, EU:C:2010:683; *Melvin West*, EU:C:2012:404; *Jeremy F. v Premier minister*, EU:C:2013:358.
[51] *Proceedings relating to the execution of European arrest warrants issued against Ciprian Vasile Radu*, C-396/11, EU:C:2013:39.
[52] *Radu*, AG's Opinion, EU:C:2012:648, para 83. The AG proposed this test instead of that of the ECtHR, according to which execution may be opposed in case of *flagrant denial* of fair trial in the requested country, or where a potential breach is established 'beyond reasonable doubt'.

rights ground.[53] Admittedly, Mr Radu argued that his rights had been violated because he had not been summoned by the issuing judge before the EAW was issued. On the other hand, the question posed by the referring court had to do, more broadly, with the possibility to refuse the execution of a EAW on the basis of a fundamental rights breach. Granted, references for preliminary rulings always arise from a concrete case, and the violation of fundamental rights in the case of Mr Radu could be questioned. Unlike the AG, the Court seemed to completely close the door, at least at that moment, to considering breaches of fundamental rights as a basis for refusing the execution of a EAW.

In *Lanigan*, the questions referred concerned the interpretation of Article 17, read in conjunction with Article 15, and Article 12 EAW FD. Articles 17 and 15 establish procedures and time-limits for the decision on the execution of a EAW, whereas Article 12 provides for the possibility, for the executing judge, to order the provisional release of the person concerned during execution procedures.[54] The doubts raised by the national court had to do with: the effects deriving from the executing Member State's failure to comply with the time-limits; the possibility to envisage a right for the person to be released, in light of that failure. The Court found that the expiring of the time-limits neither precludes the execution of the EAW, nor creates a general and unconditional obligation to release the person. Such an interpretation 'could limit the effectiveness of the surrender system put in place by the Framework Decision and, consequently, obstruct the attainment of the objectives pursued by it'.[55] Once again, the Court placed a strong emphasis on effectiveness. However, the CJEU found that Article 1(3) determines an obligation to interpret the EAW FD in compliance with the Charter. As far as that specific case was concerned, the relevant provisions to take into account were Articles 6 and 52 CFREU.[56] As for the right to liberty, the CJEU relied on the ECtHR's case-law on Article 5(1)(f) ECHR (which, however, refers to the right to liberty in the context of *extradition* procedures). In particular, the right to liberty would result in the duty, for the executing judge, to hold that person in custody so long as the procedure for the execution are carried out in a sufficiently diligent manner. In order to ensure that this is the case, the executing judge is required to consider factors such as: the possible failure to act on the part of the authorities of the Member States concerned; any contribution of the requested person to that duration; the sentence potentially faced by the requested person; the potential risk of that person absconding; the fact that the requested person has been held in custody for a period the total of which greatly exceeds the time-limits stipulated in Article 17. Should the judge opt for release, s/he

[53] *Radu*, EU:C:2013:39, para 43.
[54] *Minister for Justice and Equality v Francis Lanigan*, C-237/15 PPU, EU:C:2015:474.
[55] Ibid, para 50.
[56] Ibid, paras 53 onwards.

should adopt any measures to ensure that the material conditions necessary for the surrender remain fulfilled. Article 52(1) CFREU requires that limitations of Charter rights be provided for by law, respect the essence of those rights and, subject to the principle of proportionality, be necessary and genuinely meet objectives of general interest. The *Lanigan* judgment is important, as it reveals higher consideration for the right to liberty and the principle of proportionality, on the part of the Court of Justice.

A further step forward towards a more balanced interpretation of the EAW FD has been taken by the Court in the *Caldararu* judgment, where the CJEU had to deal with the possibility to refuse the execution of a EAW on the basis of the risk of inhumane treatment in the issuing Member States (Romania and Hungary), due to poor detention conditions.[57] The AG's Opinion was characterised by heavy reliance on the principle of mutual trust. The AG stated that introducing a systematic ground for refusal, based on the risk that the person concerned will be subject to inhumane detention conditions in the issuing state, would undermine the mutual trust that founds judicial cooperation within the EU. Article 19 CFREU and recital 13 EAW FD state that 'No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. By not mentioning the *surrender*, these provisions would reveal the intention, of the Union legislature, to leave the EAW system outside their scope of application. The Union legislature, when establishing the grounds for refusal enumerated in the FD, did not provide for refusal of execution based on violations of fundamental rights. The application of a systematic check on detention conditions, performed by the executing judge, would be incompatible with the principle of mutual trust, according to which Member States are presumed to respect fundamental rights.

To this end, the issuing and executing states have a key role to preserving that trust and the functioning of mutual recognition. On the one hand, and except for the cases laid down in Articles 3 to Article 4a, the executing judge is to surrender the person even if the provisions of its national law, including constitutional ones, would provide a higher level of protection of fundamental rights.[58] What the executing judge can (has to) do in case of systemic deficiencies is assessing, through an exchange of information with the issuing judge, whether the person will be detained in proportionate conditions. On being a general principle of EU law, proportionality could be relied on to refuse the execution of a EAW. Detention conditions would be proportionate where: they do not result 'in the detachment from society of the person concerned', in the case of a EAW issued for execution purpose; they remain strictly related to the aim of prosecution, in the case of a EAW

[57] *Aranyosi and Căldăraru*, EU:C:2016:198.
[58] *Melloni*, EU:C:2013:107.

issued for that purpose. The issuing judge, on its part, is called on to apply a proportionality check, and issue a EAW by taking into account the nature of the offence and the regime of execution. Broadly, the issuing Member State should take all necessary measures, including reforms of criminal policy, to ensure that that person serves his/her sentence in conditions which respect fundamental rights.

The Court decided differently from the AG, by according Article 1(3) a major role for fundamental rights protection. The CJEU found that Article 1(3) obliges Member States to respect the prohibition of inhumane and degrading treatment, as stated in Article 4 CFREU. This implies that, where the executing judge has objective, reliable, specific and properly updated evidence showing that there are deficiencies, which may be 'systemic *or* generalised, *or* which may affect certain groups of people, *or* which may affect certain place of detention, with respect to detention conditions in the issuing Member State', that judge must, pursuant to Article 15(2) EAW FD, request that the issuing judge provide supplementary information (emphasis added). The evidence at the basis of the request under Article 15(2) may be obtained from, *inter alia*, 'judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN'. The decision on the surrender must be postponed until supplementary information are obtained, allowing it to exclude the risk of inhumane treatment. Should that risk cannot be discounted within a reasonable time, the executing judge is to decide whether the surrender procedure should be brought to an end. Meanwhile, the person concerned should be held in custody only in so far as the duration of the detention is not excessive, on the basis of the requirement of proportionality laid down in Article 52(1) of the Charter.[59]

C. Proportionality and Detention Conditions in the Right to Liberty

The EAW FD and the interpretation of the CJEU have important implications in terms of the right to liberty. In *Radu*, the Court rejected the possibility not to execute a EAW on fundamental rights ground. The *Lanigan* and *Caldararu* judgments improve the protection of the individual. Firstly, it is clarified that the EAW FD is to be interpreted in light of the right to liberty and Article 52 CFREU, which makes restrictions of the Charter rights conditional upon the proportionality principle. Secondly, the execution of a EAW must be deferred – or even abandoned – where there are serious reasons to believe that detention conditions in the issuing state would expose the person concerned to the risk of inhuman or degrading treatment.

[59] *Aranyosi and Căldăraru*, EU:C:2016:198, para 101.

Three main issues related to the right to liberty emerge from the EAW FD and its interpretation on the part of the CJEU: the refusal of execution of a EAW on fundamental rights ground; the application of the proportionality test; the role of poor detention conditions in the issuing state. As for the first issue, the Court was rather reluctant to admit such a possibility in earlier judgments, but the latest development in the case-law has increasingly opened the door to it. I submit that it is EU law that authorises the refusal on fundamental rights ground. Even though fundamental rights violations are not included in the possible grounds for refusal enumerated in the EAW FD, Article 1(3) explicitly states that the FD has not the effect of modifying Member States' obligation under Article 6 TEU. In other words, the Member States cannot apply the FD, where the latter would result in a fundamental rights violation. Furthermore, the CJEU has explicitly affirmed that EU secondary law should not be implemented, where this can bring about the breach of a general principle of EU law or a Charter right.[60]

Also the possible application of the principle of proportionality in the context of the EAW has been largely debated.[61] For what concerns primarily the right to liberty, I argue that the proportionality test should be applied by the executing Member State, when deciding whether or not holding the person in detention. Indeed, it is the executing judge that firstly decides on deprivation of liberty. The test would *always* apply. It constitutes a preliminary requirement of any limitations of the Charter rights (then also the right to liberty) under Article 52 CFREU, and should relate the proportionality of *opting for detention* to *the aim of ensuring the enforcement of the EAW*. To this end, circumstances such as the seriousness of the offence, the time of its (alleged) commission, as well as the personal situation of the person concerned in the executing Member State (in terms of family, working and social links), should be taken into account.

Detention conditions constitute a thorny issue as well, as shown by the recent CJEU's judgment in *Caldararu*.[62] Both the case-laws of the ECtHR and the CJEU have acknowledged that poor detention conditions may result in violations of fundamental rights.[63] The traditional legal reference in this respect is Article 3 ECHR, which prohibits torture and inhuman and degrading treatment. However, this requires a high threshold to be met, and the case may be that bad detention conditions are *too poor* to be lawful, but *not poor enough* for invoking Article 3 ECHR.[64] Another legal anchor is needed, in order to better protect individual rights. I submit that this anchor is the right to liberty.

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[60] L Mancano, 'Another Brick in the Whole. The Case-Law of the Court of Justice on Free Movement and Its Possible Impact on European Criminal Law' (2016) 8 (1) *Perspectives on Federalism* 1, pp. 12 onwards.

[61] A Weyembergh, I Armada, C Brière, see note 33 above.

[62] Ibid, pp. 50 onwards.

[63] *Aranyosi and Căldăraru*, AG's Opinion, EU:C:2016:140, paras 30-34.

[64] However, the case-law ECtHR has significantly improved over the years, and has lowered the threshold required especially with regard to the burden of proof. See on this V Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece' (2012) 14 (1) *European Journal of Migration and Law* 1; P Mallia, 'Case of M.S.S. v. Belgium and Greece: A Catalyst in the Re-thinking of the Dublin II Regulation' (2011) 30 (3) *Refugee Survey Quarterly* 107.

The ECtHR has stated that detention conditions can be symptom of a possible violation of Article 5 ECHR.[65] The requirement that one shall be deprived of liberty according to the *procedures* established by the law means that, until deprivation of liberty is ongoing, the legal procedures are to be abided by. This regards in particular the rules on the enforcement. Poor detention conditions may not violate Article 3 ECHR, but be unlawful and create a situation of arbitrariness all the same, so giving rise to breach of the right to liberty. The *Caldararu* judgment could have far-reaching consequences in this respect. Firstly, the CJEU established a link between Article 1(3) EAW FD and the obligation to respect fundamental rights in relation to the execution of a EAW. The Court explicitly opened to the non-implementation of EU law, in case of risk of fundamental rights violation. Granted, what was at stake in *Caldararu* was an absolute prohibition, such as that enshrined in Article 4 CFREU. Other fundamental rights can be balanced, as is the case of the right to fair trial. One could not expect the application of the *Caldararu* test to any fundamental right violations. Probably, the Court will have the opportunity to clarify the actual reach of the principles stated in this judgment. This nonetheless, the Court acknowledged that Article 1(3) EAW FD can give the basis for limiting the implementation of mutual recognition. Furthermore, the conditions set out by the Court for the request of supplementary information (which may in turn lead to postponement and non-execution of the EAW) are not cumulative, as the deficiencies can be systemic *or* affect certain groups of people *or* places of detention. The question arises as to what consequences this can have for the right to liberty. The right to liberty can indeed be limited, as shown by the cases of lawful detention enumerated in Article 5(1) ECHR. However, deprivation of liberty is not lawful for the mere fact that it is carried out in one of the cases provided for in the ECHR. It has to be not arbitrary. The ECtHR test revealed that inappropriate detention conditions can result in a situation of arbitrariness and, therefore, a violation of Article 5 ECHR. It is helpful to recall that the instant case was a very particular one, revolving around an absolute prohibition such as that of Article 4 CFREU. However, nothing in the Court's judgment precludes the application of the *Caldararu* test to those situations of unlawfulness that violates the right to liberty, while not meeting the threshold of Article 4 CFREU.

From the interaction between the proportionality test and the right to liberty as outlined above, it seems rather safe to assume that the executing judge should take into account detention conditions in: the *executing state*, when it comes to decide as to whether detaining the person concerned during EAW procedures; the *issuing state*, where the execution of the EAW and the surrender of the individual are at stake.

[65] *Chahal v The United Kingdom* (Application no. 22414/93) (1996), 23 E.H.R.R. 413, para 74.

The present discussion paves the way to the analysis of the FDs on the transfer of prisoners, the probation measures and the ESO. Firstly, I stress the lack of procedural rights in the context of procedures resulting in deprivation of liberty. Secondly, I highlight that the application of mutual recognition to criminal matters requires a reconsideration of the right to liberty in EU law. In particular, the condition that deprivation of liberty is to be carried out in the (1) *cases* and (2) *procedures* established by the law should lead to rethinking the content of these two concepts.

D. The FDs on the Transfer of Prisoners, Probation Measures and the ESO

The three FDs on the transfer of prisoners, probation measures and pre-trial measures alternative to detention are particularly relevant to the right to liberty.[66] They all result in deprivation of liberty (the coercive transfer) of the person concerned, once the judicial decision at stake has been recognised. After the transfer is completed, the individual will be subject to a new legal regime, which will differ from that of the issuing state, with the possibility of different rules concerning the *substantive* basis for detention and the *procedural* measures for deprivation of liberty. For example, the breach of a *pre* or *post* trial measure alternative to detention may have differing penalties in each member state. *Procedures* for the deprivation of liberty, concerning the enforcement of detention, the penitentiary regime and detention conditions, may also vary significantly. The FDs lay down no guarantees to ensure that each individual is adequately informed of the potential alteration in the content of their right to liberty.

The FD on the transfer of prisoners creates a mechanism of mutual recognition of custodial sentences and judgments involving deprivation of liberty between Member States. When the judgment is recognised by the executing Member State, the prisoner is consequently transferred therein. The purpose of the FD is to increase prisoners' chances of rehabilitation. However, in the preamble it is stated that the consent of the person concerned should no longer be dominant, for the purposes of recognition and enforcement of the sentence imposed.[67] The FD has not the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU.[68] The person can be transferred even where s/he has not provided the consent, where the executing Member State is: the Member State of nationality in which the sentenced person lives; where the sentenced person will be deported, once s/he is released from the enforcement of the sentence on the basis of an expulsion or deportation consequential to the judgment; where the sentenced person has fled or otherwise returned in view of the criminal

[66] The FD on the transfer of prisoners has been also subject to a reference for a preliminary ruling. See, *Criminal proceedings against Atanas Ognyanov*, C-554/14.
[67] See note 5 above, recital 5, Article 4.
[68] Ibid, Article 3.

proceedings pending against him or her in the issuing State or following the conviction in that issuing State. In the absence of the possibility to give his/her consent, the person concerned is provided with a generic 'opportunity' to express his/her opinion, which in turn must be taken into account.[69] However, the FD lays down no rules to ensure an appropriate level of participation of the person concerned in the procedures of recognition and execution.

The FD on probation measures provides for the application of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and sanctions alternative to deprivation of liberty.[70] The aim of the FD is enhancing the prospects of the sentenced person's being reintegrated into society and improving monitoring of compliance with probation measures and alternative sanctions.[71] The FD involves the recognition of judgments and probation measures, and the consequent transfer of responsibility for the supervision of probation measures and alternative sanctions from the issuing to the executing Member State. The issuing State may forward a decision to the state where the sentenced person is lawfully and ordinarily residing, when the sentenced person has returned or wants to return to that State. The law applicable is that of the executing Member State, which has the jurisdiction to decide on: modification of the measure; revocation of the suspension of the execution of the judgment or revocation of conditional release; the imposition of a measure involving deprivation of liberty.[72] If so requested, the executing State shall inform the issuing State of the maximum duration of deprivation of liberty foreseen in the executing State for the offence that could be imposed in case of breach of the probation measure or alternative sanction.[73] The executing State shall immediately notify of any finding which may bring about the revocation of the alternative measure, or the imposition of a measure involving deprivation of liberty. Also in this case, the FD provides no rights or rules on the participation of the person concerned in the procedures of recognition and transfer.

The ESO FD establishes a system of recognition of supervision measures alternative to detention. Studies have showed that Member States' judicial authority are rather reluctant to provide persons not living therein with bail. This is mainly due to the circumstance that those persons have not stable residence or address in that Member State. These individuals are consequently placed in pre-trial detention when national or resident would not, in a comparable situation. This creates a state of play in which there are two alternative choices at disposal of Member States' judiciary: provisional

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[69] Ibid, Article 6.

[70] For a historical analysis, see S Neveu, 'Probation Measures and Alternative Sanctions in Europe: From the 1964 Convention to the 2008 Framework Decision' (2013) 4 (1-2) *New Journal of European Criminal Law* 134.

[71] See note 6 above, recital 8.

[72] For consideration on probation in Europe, see I Durnescu, 'The future of probation in Europe: Common in the middle and diverse at the edge' (2013) 60 (3) *Probation Journal* 316; I Durnescu and B Stout, 'A European approach to probation training: An investigation into the competencies required' (2011) 58 (4) *Probation Journal* 395.

[73] See note 6 above, Articles 13-16.

detention or unsupervised movement. In most cases, the national judges opt for deprivation of liberty. However, the persons affected by this framework have not been tried. Therefore, the right to liberty and the presumption of innocence of a great deal of EU citizens (and not only) are posed under threat throughout the EU.[74] To address this thorny issue, the EU has adopted a FD on the mutual recognition of decisions on supervision measures alternative to provisional detention. The ESO FD has a twofold aim: monitoring the defendants' movements; enhancing the right to liberty and the presumption of innocence of the persons concerned.[75] Should the person concerned not return to the issuing State voluntarily, he or she may be surrendered to the issuing State in accordance with the EAW FD, so that the latter provisions apply.

The FD does not confer any right on the person to the use, in the course of criminal proceedings, of a non-custodial measure. A decision on supervision measures may be forwarded to the Member State where the person is lawfully and ordinarily residing, so long as s/he consents to return to that State. The law applicable is the law of the executing Member State.[76] The issuing State has the competence on all subsequent decisions relating to a decision on supervision measures, and in particular: the renewal, review, withdrawal, modification of the supervision of the measures; the issuing of an arrest warrant or any other enforceable judicial decision having the same effect.[77] The issuing Member State must be immediately informed of any finding which can lead to the adoption of any of those measures. If the competent authority of the issuing State has issued a EAW or any other enforceable judicial decision having the same effect, the person shall be surrendered in accordance with the EAW FD.

In this section, I have briefly outlined the main features of the FDs on the transfer of prisoners, probation measures and pre-trial measures alternative to detention. I have highlighted the relevance of these instruments to the right to liberty from a twofold point of view. Firstly, they all entail deprivation of liberty of the person concerned, due to the transfer from the issuing to the executing Member State. Secondly, the lack of clear rules concerning the participation of the individual in the procedures of recognition emerges. This is highly relevant to the right to liberty not only because the individual can be subject to the coercive transfer. The transfer to another state results in the application of rules possibly different from those of the issuing state, with regard to *cases* and *procedures* of deprivation of liberty. In the following, I argue that the minor involvement of the

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[74] E Cape et al (eds), *Suspects in Europe. Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Intersentia, 2007); A M van Kalmthout et al (eds), *Pre-trial Detention in the European Union. An Analysis of Minimum Standards in Pre-trial Detention and the Grounds for Regular Review in the Member States of the EU* (Wolf Legal Publishers, 2009).

[75] See note 7 above, recital 3.

[76] Ibid, Article 16.

[77] Ibid, Article 18.

individual in procedures of recognition can significantly affect the awareness of how his/her right to liberty can be limited in the executing state.

E. The Right to Liberty and Coercive Movement of People within the EU

In the discussion concerning the EAW, I threw in relief the importance of proportionality and poor detention conditions to the right to liberty in the context of mutual recognition. The three FDs just analysed bring to the fore other significant aspects concerning the relationship between the right to liberty, and the higher level of automaticity in inter-state cooperation in criminal matters introduced by mutual recognition. In the following, I shall present two key points: the inadequate level of individual rights in procedures that give rise to deprivation of liberty; the lack of legal certainty concerning possible *cases* and *procedures* of deprivation of liberty that can arise on the basis of the application of these FDs.

1. Procedural Rights of the Individuals

With regard to the lack of procedural guarantees in the context of procedures of mutual recognition, the FD on the transfer of prisoners seems to be the most problematic. It removes the consent of the person concerned for the purposes of the transfer, in particular where the executing State is where the person lives or where s/he should be returned on the basis of an expulsion order.[78] The FD establishes only that the opinion of the person concerned must be taken into account. Furthermore, the FD is completely silent as to the procedures to be followed when adopting the decision on the transfer: no individual rights are provided for in this respect. The FD on probation measures and the ESO FD are 'triggered' at request of the person concerned. Also in these cases the individual will be subject to deprivation of liberty, as s/he will be transferred to the executing Member State. However, these instruments do not ensure an adequate level of participation of the person concerned in the procedures of recognition. What emerges from the analysis of the three FDs is a sharp contrast in individual rights protection between criminal proceedings, on the one hand, and mutual recognition procedures, on the other. Mutual recognition procedures have uncertain nature: they cannot be considered part of criminal proceedings, but have significant impact on personal liberty all the same. The EU has adopted three directives on (1) translation and interpretation,[79] (2)

[78] For critical considerations on this aspect, see V Mitsilegas, 'The third wave of third pillar' (2009) 34 (4) *European Law Review* 523, pp. 541 onwards.

[79] Council Directive (EU) No 2010/64 [2010] OJ L280/1. R Vogler, 'Lost in Translation: Language Rights for Defendants in European Criminal Proceedings' in S Ruggeri (ed), *Human Rights in European Criminal Law* (Springer, 2014), pp. 95-110.

information[80] and (3) the access to the lawyer in criminal proceedings.[81] As scope of application, the Directives lay down rules concerning these rights (1) *in criminal proceedings* and (2) *proceedings for the execution of a EAW*.[82] Therefore, the EU legislature acknowledges the difference between these two kinds of procedures. These instruments are aimed to reduce the existing distance of standard of protection between criminal proceedings, on the one hand, and the EAW, on the other. Unfortunately, this improvement has not involved the other three FDs. However, they have significant implications in terms of the right to liberty as well, so that there is no good reason for this discrepancy in terms of individual guarantees.

This uneven state of play is worsened by the problems arising with regard to the right to liberty and legal certainty, which I shall deal with in the next sub-section.

2. *Legal Certainty*

In terms of legal certainty, the FDs leave much to be desired. However, this article is on the impact of mutual recognition on the right to liberty, so that I shall highlight the criticality concerning this specific right.

The FDs on probation measures and pre-trial measures alternative to detention stipulate that the decision on the recognition is to be taken within 60 days. However, they also provide that this time-limit may not be complied with, where *exceptional circumstances* occur.[83] No further deadlines are laid down, so that the transfer of the person concerned can be suspended *sine die*.[84] This is highly problematic. As shown, the ESO FD usually applies where the person concerned is in pre-trial detention just for not being in his/her country of residence. The transfer to the executing state would be conducive to setting him/her at free. The same logic underlies the FD on probation measures. Allowing for continuing detention of the individual on a very broadly-worded legal basis (*exceptional circumstances*), without a term for a decision being set, could be highly detrimental to the right to liberty.

The impact of these instruments on the right to liberty involves also the lack of legal certainty with regard to *cases* and *procedures* of deprivation of liberty. To this end, the ECtHR has clarified that the right to liberty presupposes legal certainty: the law *authorising* and *regulating* deprivation of

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[80] Council Directive (EU) No 2012/13 [2012] OJ L142/1. S Quattrocolo, 'The Right to Information in EU Legislation' in S. Ruggeri (ed), ibid.

[81] Council Directive (EU) No 2013/48 [2013] OJ L 294/1. See L Bachmaier Winter, 'The EU Directive on the Right to Access to a Lawyer: A Critical Assessment', in S. Ruggeri (ed), ibid.

[82] See T Spronken et al, *EU Procedural Rights in Criminal Proceedings* (Maklu, 2009); E Guild and L Marin (eds), *Still not resolved? Constitutional Issues of the European Arrest Warrant* (Wolf Legal Publishers, 2009).

[83] See notes 6 and 7 above, Articles 12(2) and 12(3).

[84] However, the FD on probation measures states that a new time limit should be established by the authority of the executing state (Article 12(2)).

liberty is to be of sufficient quality. The automaticity introduced by mutual recognition in inter-state cooperation in criminal matters calls for deeper application of the requirement that deprivation of liberty take place in the *cases* and according to the *procedures* established by the law. In the previous sub-section, I highlighted the relevance of the FDs to the right to liberty, since they result in the coercive transfer of the person. The following asymmetry can be discerned. On the one hand, the FDs confer upon the states the power to deprive a person of liberty; on the other, the procedures on the basis of which this deprivation should be carried out, as well the participation of the individual in these procedures, are not regulated at all.

The phase that follows the transfer to the executing state is not less problematic. Once the transfer is completed, the person will be subject to a different legal regime. This regards both the *cases* and the *procedures* of detention. The cases of deprivation of liberty are understood as situations that can lawfully give rise to deprivation of liberty. For instance, the executing state can feature stricter rules than the issuing state in case of breach of a *pre* or *post* trial measure alternative to detention, and sanction these infringements with deprivation of liberty (as a punishment or more severe pre-trial measure). The lack of involvement of the person in the procedures of recognition can seriously affect awareness of these aspects, capable of resulting in deprivation of liberty. Such uncertainty involves also the *procedures* of detention, and in particular the phase of enforcement. As clarified at the outset of this paper, the requirement that deprivation of liberty be carried out according to the procedures established by the law logically includes the phase that follows the apprehension of the person concerned. So long as deprivation of liberty is ongoing, clear legal procedures are to be established and abided by. In this context, significant difference of procedures can regard especially the penitentiary regime in the executing Member State. This is particularly problematic as far as the FD on the transfer of prisoner is concerned, since this instrument provides for the transfer of the person even without his/her consent. The FDs allow for and regulate – to a very little extent – deprivation of liberty and transfer of the person concerned, on the one hand. On the other, they provide no guarantees that the individual is made aware of his/her rights with regard to transfer procedures, as well as the difference of legal regimes that can affect his/her right to liberty. This has to do with those situations that can give rise to deprivation of liberty, and the way in which deprivation of liberty is enforced in the executing state.

One could object that the rules are still provided at national level, so that EU law would not be involved in such considerations. It is for national laws to determine the rules regarding prison regimes, or the consequences of breach of probation measures.[85] However, the person concerned is

[85] On the state of play of implementation of these FDs at national level, see the Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of

subject to a different legal framework after s/he has been forcedly transferred to another Member State. That transfer is based on a procedure regulated by EU law; a procedure in which the person concerned has no specific rights or guarantees. Either by directly providing for deprivation of liberty (e.g. the coercive transfer), or giving the basis for further and different deprivation (rules on *pre* and *post*-trial measures), these EU law instruments are undeniably relevant to the right to liberty, and create an unbalanced legal framework at the expenses of individual rights.

IV. Final Remarks

This article discussed the relationship between the right to liberty in EU law and the application of mutual recognition to criminal matters. In particular, I analysed the possible impact that four FDs can have on the right to liberty. Namely, the FDs on the EAW, the transfer of prisoners, the probations measures, the pre-trial measures alternative to detention. The main claim is that the high level of automaticity in judicial cooperation introduced by mutual recognition requires an appropriate and better balance between effectiveness of judicial cooperation and individual guarantees. The right to liberty in EU law is protected by Article 6 CFREU, which has the same meaning and scope as Article 5 ECHR, as resulting from the interpretation of the ECtHR. This right to liberty requires that deprivation of liberty be carried out in the *cases* and according to the *procedures* established by the law. This implies the need for legal certainty: the law is not to be framed in such a way as to provide the authorities with an unbounded power. I argue that the *cases* of deprivation of liberty should include all those situations capable of resulting in deprivation of liberty, such as breach of probation measures. The *procedures* logically involve also the enforcement of deprivation of liberty, in particular detention conditions and penitentiary regimes. This is confirmed by the test elaborated by the Strasbourg Court, according to which deprivation of liberty in the context of inter-state cooperation in criminal matters is lawful where it is: carried out in good faith; closely connected to the ground of detention relied on by the executing judicial authority; *enforced in appropriate place and conditions*; reasonably lengthy in relation to the purposes pursued.

When it comes to assess the right to liberty in the context of mutual recognition procedures, the fundamental right provision referred to by the EU's institutions is Article 5(1)(f) ECHR. However, the ECtHR's interpretation thereof poses three main problems: that test regards extradition, which is rather different from mutual recognition; it provides for no requirements in terms of proportionality and necessity of detention, but only that extradition procedures be ongoing and carried out with due

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liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, Brussels, 5.2.2014 COM(2014) 57 final.

diligence; detention in the context of extradition has been granted a lower standard of protection than e. g. detention on remand. The EU at legislative, and judicial, levels stated that mutual recognition procedures (and the EAW in particular) may not be considered a mere variant of extradition. For all these reasons one could call into question the choice of Article 5(1)(f) as the suitable fundamental right reference for the right to liberty in the context of mutual recognition.

To this end, the Court's approach to the right to liberty has improved over the years. Even though the CJEU initially denied the possibility not to execute a EAW in case of breach of the right to liberty, the Court has then stated the need for interpreting the EAW FD in light of Articles 6 (the right to liberty) and 52 (the principle of proportionality) CFREU. Furthermore, the Luxembourg judge has recently opened the door to the non-execution of a EAW on the basis of inhumane or degrading detention conditions: namely, for violations of Article 3 ECHR. Against this background, in this paper, I argued the following. The proportionality test should always be applied by (at least) the executing judge to the decision on the detention of the person concerned, while the procedures of recognition and execution of the EAW are ongoing. Poor detention conditions that are not able to reach the threshold required by Article 3 ECHR, but result in a situation of arbitrary detention all the same, should lead to the non-implementation of mutual recognition. It would be so on the basis of the violation of the right to liberty. As for the assessment of detention conditions in the issuing state, the *Caldararu* test would be applicable. Firstly, the executing judge could rely on evidence provided by international and state courts, as well as reports of bodies under the CoE or the United Nations. Secondly, the judge could ask for additional information to the issuing judge, and decide on the possible postponement and/or non execution of the EAW.

These two arguments would be valid also for the other three FDs analysed. They explicitly *allow for* and *regulate* deprivation of liberty. They establish procedures which imply deprivation of liberty (e.g. to operate the transfer of the person concerned). Due to those procedures and the transfer, the person concerned may be faced with adverse and unknown consequences, such as harsher penitentiary regimes or sanctions ensuing from the infringement of *pre* and *post* trial measures alternative to detention. However, the FDs lack rules concerning the participation of the person concerned in the procedures of recognition and execution. The distance between rights *in criminal proceedings* and in *mutual recognition procedures* has been reduced with regard to the EAW, thanks to the three procedural rights Directives. However, such an uneven legal framework remains, as far as the other three FDs are concerned.

The prison regime, or the consequences attached to the violation of a probation/supervision measure in the executing Member State, are strictly related to EU law. The person concerned would face such adverse consequences in light of a procedure established at Union level. Those procedures are

vague and confers no rights upon the individuals. The high degree of automaticity introduced by the principle of mutual recognition increases such criticality, and significantly reduces the margin of intervention of the person concerned. In conclusion, mutual recognition has currently a preoccupying impact on the right to liberty in EU law: the role of the principle of proportionality is not clear at all, legal certainty on cases and procedures of deprivation of liberty is challenged by secondary EU law, and the position of the individual in procedures seriously affecting his/her right to liberty does not ensure an adequate standard of protection.